No. 18,904

United States Court of Appeals

For the Ninth Circuit

MARINE MIDLAND TRUST COMPANY, etc., et al.,
Appellants,

vs.

CITY OF NORTH SACRAMENTO, etc.,
Appellees.

BRIEF OF APPELLANTS

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STATEMENT

Plaintiffs - Appellants (hereinafter "Plaintiffs") appeal from a judgment (Tr. 57[1]) of the United States District Court for the Northern District of California (Halbert, J.) dismissing the Complaint herein for failure to state a claim upon which relief can be granted.

The jurisdiction of the District Court had been invoked under 28 U.S.C.A. § 1332 and relief was sought pursuant to the Federal Declaratory Judgment Act, 28 U.S.C.A. §§ 2201, 2202. The Complaint (Pars.

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[1]Numbered references are to pages of the *Transcript of Record* except where otherwise indicated.

1-8[2], Tr. 1-2) alleged diversity of citizenship of the parties; that the amount in controversy exceeded $10,000; and that there was an actual and justiciable controversy between the parties which had led to the existence of an uncertain and disputed jural relationship.

This Court's appellate jurisdiction is invoked pursuant to 28 U.S.C.A. § 1291.

THE COMPLAINT

For purposes of reviewing a judgment of dismissal on the pleadings, the allegations of the Complaint are ordinarily to be accepted as fact.[3] The rule is particularly applicable to this case where the District Court, shortly prior to granting the motion for judgment on the pleadings, has denied defendants-appellees' (hereinafter "Defendants") motion for summary judgment because of the presence of material issues of fact (Tr 39).

The first count of the Complaint seeks an *in personam* declaratory judgment against defendants stating that the deposit of $2,206,000 made by defendants "is subject to claims on behalf of various persons and, therefore, is disqualified to serve as an effective payment and as a predicate for a transfer of title

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[2]Paragraph references ("Par.") will hereinafter be to paragraphs of the Complaint unless otherwise specified.

[3]See *Dann v. Studebaker-Packard Corporation,* 288 F.2d 201, 215-16 (6th Cir. 1961) and cases therein cited.

and possession [Citizens Utilities Company of California's] water system to defendant City [of North Sacramento] (Par. 1a; Tr. 23)." The gravamen of the Complaint allegations underlying this prayer are as follows:

Plaintiffs are Trustees under an Indenture of Mortgage and Deed of Trust executed by Citizens Utilities Company of Delaware ("Citizens"). Plaintiffs are the pledgees of 100% of the stock of Citizens Utilities Company of California ("Citizens of California"), a wholly owned subsidiary of Citizens and the owner of the water system condemned by Defendant City of North Sacramento ("City").

Plaintiffs are entitled, under the terms and provisions of the Indenture of Mortgage and Deed of Trust, to receive all of the proceeds resulting from condemnation of property of Citizens of California.

Plaintiffs received a telegram from defendant City, signed by its Mayor, defendant Roth. The telegram advised of the deposit by the City in the Superior Court of the State of California in the sum of $2,206,000.00 on account of condemnation of properties of Citizens of California. Plaintiffs instituted an investigation to determine the circumstances surrounding the making of the deposit.

Plaintiffs' investigation disclosed that Defendant City had condemned the North Sacramento water system of Citizens of California; that defendant City had offered for sale and sold certain *revenue* bonds to finance the acquisition thereof; and that the money

deposited in the Superior Court was derived entirely from the proceeds of that bond issue.

It further appeared that defendants had been guilty of improper and unlawful conduct in the solicitation for the sale and in the sale of the revenue bonds. In particular, defendant City had misrepresented as a fact to the bond purchasers that the proceeds of the bond issue would be sufficient to cover the acquisition cost of the water system as well as other necessary costs. The City had also failed to disclose to the bond purchasers certain material, adverse facts, namely, that pending annexation proceedings posed a threat to the financial integrity of the bonds, which were repayable solely from the revenues of the water system and were not in any way an obligation of defendant City; that California law required a condemnor to pay interest on the amount of the condemnation award from the date of Interlocutory Judgment until the taking of possession, which in this case aggregated over $350,000; that additions and betterments to the water system, for which the City would have to pay, were of a value greatly in excess of the amount stated by the City to bond bidders; and that the City might be obliged to pay additional moneys on account of appreciation to the value of the water system between the date of valuation thereof by the California Public Utilities Commission and the date of taking possession.

It also appeared that although defendants were not entitled to proceed to a closing of their bond issue until certain litigation had been completely settled—

until the bond buyer had complete assurance that such litigation could not possibly pose a threat to the ability of the City to repay principal and interest from revenues of the system alone—defendants nevertheless induced such a closing to occur, in violation of their contractual arrangement with their bond purchaser, by means of a false "no-litigation" certificate which was made and delivered to the bond buyer.

In view of the foregoing, and other matters detailed in the First Count of the Complaint, it clearly appeared that the bond buyer, and its transferees, among others, had rights of action against defendant City for rescission of the purchase, for damages, and otherwise. By the same token, the money received by the City from the defrauded bond purchaser was money burdened with these claims—tainted money. By reason of plaintiffs' knowledge of the circumstances of the City's obtaining that money, if plaintiff's were to take or receive that money, they would subject themselves to liability therefor if actions were to be commenced by the aggrieved parties.

In this posture, rather than take money which is tainted money—money which is affected with outstanding claims, and thereby subject themselves to liability for its return or for damages for its detention or other forms of suits, plaintiffs came before the District Court, on the ground of diversity of citizenship, and prayed that said Court make a declaratory judgment adjudicating the rights and obligations of the parties in the premises. Specifically, a declaration was prayed that the money on deposit in

the Registry of the Superior Court of the State of California is not money which can be tendered in payment of the obligation which it purports to discharge, by reason of its tainted nature, and that as a result plaintiffs are not required to accept it.

The Second Count of the Complaint brought before the District Court plaintiffs' claim, as Trustees, that the taking of property which stood as collateral security for indebtedness owed to the people they represent, Citizens' bondholders, is an unconstitutional taking of property which directly and materially decreases the security for the indebtedness for which plaintiffs stand as Trustees.

THE OPINION BELOW

The opinion of the District Court (Halbert, J.) dismissing the Complaint herein appears at Tr. 47-54. The lower court held (Tr. 50) that "in an action of the present type, . . . the diversity jurisdiction of the federal court [does not] require that this Court afford relief to plaintiffs."

Central to this decision below was the District Court's conclusion that the California Superior Court had "*inferentially* found against" the contentions advanced in the instant Complaint in the previously instituted condemnation proceeding, to which City and Citizens of California—but not plaintiffs—were parties. (Emphasis added.) In reaching this conclusion, the lower court relied—apparently exclusively—on the description of the state court condemnation proceed-

ing contained in the pleadings (Tr. 51-53); the Court made no reference to any extrinsic evidence relating to or going beyond the face of the state court judgment of condemnation.

Moreover, the lower court expressly noted in its opinion that its decision assumed the standing of plaintiffs, as pledgees, to bring this action (Tr. 50), and that the prayer for relief based on Count II of the Complaint, seeking to set aside the judgment of condemnation, could not operate to bar plaintiffs' right to relief if such right existed under the allegations set forth in Count I of the Complaint (Tr. 50-51).

QUESTIONS PRESENTED

1. Was it error for the court below to have dismissed the Complaint herein for failure to state a claim?

2. Did the diversity jurisdiction of federal courts which the court below, for purposes of its decision herein, assumed had been properly invoked in the first instance by plaintiffs, require that the District Court entertain the Complaint?

3. Particularly in view of the absence of any extrinsic evidence concerning the facts adjudicated by the state court judgment which the District Court held constituted a bar to this action, did the court below commit error in assuming that the aforesaid state court action—to which plaintiffs were not party —"inferentially found against" the contentions of the Complaint?

4. Was it error for the lower court to hold that the decision in *Thibodo v. United States,* 187 F.2d 249 (9th Cir. 1951) should be construed as barring plaintiffs' right to relief on the allegations contained in the Second Count of the Complaint?

ARGUMENT

POINT I

THE COMPLAINT SETS FORTH A JUSTICIABLE AND VALID CLAIM TO RELIEF.

In accordance with the law and the facts alleged in the Complaint, if plaintiffs were to receive the money deposited by defendants, they would be exposed to liability on that account to those persons who were misled by the misrepresentations complained of. Innumerable decisions hold that one who receives money with notice of the fact that the money so received is subject to the claims of a third person will be responsible for the return of the money to the aggrieved third person. See, *e.g.:*

Pollak v. Staunton, 210 Cal. 656 (1930), 293 P. 26;

Sasner v. Arnsten, 93 Cal. App. 2d 467 (1949), 209 P.2d 44;

California Bank v. Diamond, 144 Cal. App. 2d 387 (1956), 301 P.2d 60;

Rudin v. Kong-Richardson Co., 37 F.2d 637 (7th Cir. 1930).

This conclusion is reinforced by the lower court's earlier decision denying defendant's motion for summary judgment, which establishes that, on the present

record, there exist material issues of facts which, when resolved in plaintiffs' favor would entitle plaintiffs to relief.

The relief to which plaintiffs are entitled includes the remedy of a declaratory judgment. There can be no question but that were plaintiffs to receive the money deposited by defendants they would be exposed to liability to the persons who relied on the misrepresentations made by defendant City, as alleged in the Complaint. In this posture, it is clear that plaintiffs need not accept the money and then assume the risk of being named defendants in lawsuits by bond purchasers. Authorities make it clear that plaintiffs are entitled, at this stage of proceedings, to bring this declaratory judgment action for an adjudication of their rights and obligations so that they may avoid the necessity to take such steps as will necessarily expose them to liability.

The broad and remedial purpose of the Declaratory Judgment Act, and the need for a liberal interpretation thereof, is fully set forth in *Simmonds Aerocessories v. Elastic Stop Nut Corp.*, 257 F.2d 485 (3rd Cir. 1958). Moreover, in *Dewey & Almy Chemical Co. v. American Anode, Inc.*, 137 F.2d 68 (3rd Cir. 1943), cert. denied 320 U.S. 761, the court stated (at pp. 69-70):

> "In providing the remedy of a declaratory judgment it was the Congressional intent 'to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued.'

> * * * This court has emphasized that the Act should have a liberal interpretation, bearing in mind its remedial character and the legislative purpose."

Similarly, in *Scott-Burr Stores Corp. v Wilcox,* 194 F.2d 989 (5th Cir. 1952), the court indicated that the Declaratory Judgment Act is available for settling controversies "before they ripen into violations of law or breach of contractual duty."

As hereinabove noted, plaintiffs' standing to maintain this action was conceded by the decision below, notwithstanding that the greater part of defendants' argument on both their motion to dismiss and on their prior motion for summary judgment was directed to the proposition that plaintiffs lacked such standing. The grounds for the lower court's decision on that score were set forth in its January 30, 1963 Memorandum and Order (Tr. 43-45) and are clearly correct. Other decisions amply reinforce the lower court's initial conclusion that plaintiffs, as the pledgees of the stock of Citizens of California, have standing to protect their security against impairment by the acts of the defendants. See, *e.g., York Properties, Inc. v. Neidoff,* 170 N.Y.S. 2d 683,[4] where the court stated:

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[4]Note that New York decisions are particularly significant in the present situation inasmuch as the stock of Citizens of California pledged to plaintiffs was stock pledged in the State of New York and the Trust Indenture regulating such pledge was executed in and is governed by the laws of the State of New York. Under these circumstances it would appear that, pursuant to traditional rules of conflicts of law, the laws of the State of New York would be controlling in respect of a pledgee's standing to maintain this action. See *Miller v. Wahyou,* 235 F.2d 612, 615 (9th Cir. 1956).

> "A pledgee of corporate stock who receives an assignment of shares has a security for a debt as a right therein to the full extent necessary to protect the indebtedness, and may sue in equity to preserve the corporate property and to prevent its passing out of the hands of the corporation (Campbell v. American Zylonite Co., 122 N.Y. 455; see Fletcher, Cyclopedia of Corporations, Vol. 12A, § 5651)." (Emphasis added.)

See also *Cannon v. Parker,* 152 F.2d 706, where, in a situation in many ways analogous to the instant case, the right of a pledgee of stock to institute an action was upheld in the following language (at p. 709):

> "The appellees [pledges of stock in question] were not creditors of the . . . . corporation, but of Cannon [the pledgor, whose position is analogous to Citizens Utilities, Inc., the parent company]. Their relationship to the corporations was solely that of stockholders by endorsement and pledge by Cannon of shares of stock. . . . Nor were they suing Cannon to collect their debt, which was not in default. They had a long term investment drawing monthly interest which they wished to preserve. Their aim was to maintain the integrity of the corporate assets and restore what had been misapplied."

Moreover, the lower court's aforesaid January 30, 1963 Memorandum and Order aptly suggested as an applicable analogy to our situation the case of *Consolidated Water Co. v. City of San Diego,* 89 Fed. 272 (C.C.S.D. Cal. 1878), in which it was held that a mortgagee has standing to sue in his own right without

first making demands of the corporate mortgagor. The parallel between a creditor such as the mortgagee and one whose claim is secured by pledge (such as plaintiffs herein) is complete. This proposition is recognized by the New York cases as well. See *East River Savings Bank v. State,* 266 App. Div. 494, 43 N.Y.S.2d 703 (3rd Dep't 1943), where a mortgagee bank, as equitable owner of land, was held entitled to bring a suit for damages in a condemnation proceeding pursuant to a statute allowing "any owner" to assert a claim, notwithstanding that the legal owner had previously approved a settlement in respect of the condemnation. Cf. *Bunyan v. Commissioner of Palisades Interstate Park,* 167 App. Div. 457, 153 N.Y. Supp. 622 (3rd Dep't 1915) (corporate bondholders held not obliged to apply to corporation as prerequisite to bringing their action).

POINT II

THERE IS NO BASIS IN LAW OR FACT FOR THE DISTRICT COURT'S CONCLUSION THAT THE STATE COURT CONDEMNATION ACTION— TO WHICH THE PLAINTIFFS WERE NOT PARTY—"INFERENTIALLY" CONSTITUTED A DETERMINATION ADVERSE TO THE ALLEGATIONS SET FORTH FOR THE FIRST TIME BY THE PRESENT COMPLAINT.

The decision of the court below, dismissing a Complaint otherwise assumed to be meritorious, was premised on that court's assumption that the decision of the California Superior Court in the condemnation action entitled *City of North Sacramento v. Citizens Utilities Company of California,* included a deter-

mination "inferentially" adverse to the allegations of the instant Complaint. From this assumption followed the District Court's conclusion that the present action must be barred as constituting a collateral attack on the state court judgment.

It is clear, however, that the questions raised by the allegations of the instant Complaint were not, in fact, need not have been, and ordinarily would not have been considered or in any way passed upon by the California Superior Court in the said condemnation action. In this connection it should be noted that the District Court, in reaching its aforesaid conclusion, placed exclusive reliance (Tr. 52-53) on the following portion of the findings and judgment of the California Superior Court:

> "that plaintiff [City] has already paid into court for defendant [Citizens of California] the sum of Two Million Two Hundred Six Thousand Dollars ($2,206,000) as the just compensation fixed in the Interlocutory Judgment . . ." (Final Order, page 1, Exhibit D to City's answer in the present action),

and that based upon said payment,

> "It Is Ordered, Adjudged and Decreed:
>
> I
>
> "That said condemnation and taking provided for in said Interlocutory Judgment of Condemnation in said proceeding is complete and final; plaintiff [City] fully has and owns the lands, properties and rights sought in said proceeding . . ." (Final Order, page 1.)

There was no extrinsic evidence whatsoever before the District Court—nor did any such evidence exist—indicating that any of the issues raised by the instant Complaint as to the improprieties associated with the bond issue precedent to such deposit of money, had been passed upon, considered by, or were known to the California Superior Court.

Under these circumstances, it is respectfully submitted that there exists no basis in law or in fact for the lower court's conclusion that the instant action represents a collateral attack on a state court judgment.

A. The Issues Raised by the Complaint Herein Are Not Such as Would Normally Be Dealt With or Concluded by a California Judgment of Condemnation.

The instant Complaint raises, *for the first time,* questions concerning the propriety of the methods by which defendants raised certain funds. The complainants' standing to seek the relief prayed for herein derives from the fact that, absent such relief, they will be the ultimate recipients of the funds alleged to have been improperly raised and will themselves be subject to rescission actions by bond purchasers. The fact that the proceeds of an improper bond issue were ultimately deposited with the California Superior Court is in no way related to or exculpatory of the misrepresentations (as alleged in the instant Complaint and admitted as true for the purposes of this motion) which were made in connection with such bond issue.

As one indication of the complete lack of any such relationship, plaintiffs point out that they have been unable to locate any California condemnation decisions wherein this type of impropriety was raised before or dealt with by the California courts in similar condemnation proceedings.

Moreover, it is clear that the normal procedure followed in California condemnation cases is such that the issues raised by the instant Complaint would *not* ordinarily be passed upon by the California condemnation courts. A condemnation proceeding of the kind relied upon herein by the District Court to bar plaintiffs' right to relief is normally commenced under the Public Utilities Act by filing of a petition with the Public Utilities Commission. Such petition sets forth the intention of a political subdivision to acquire land under eminent domain proceedings (Public Utilities Act, § 1403). Thereafter, an order to show cause is made by the Commission which specifies the owners and claimants named in the petition and directs them to appear before the Commission at a specified time and place to show cause why the Commission should not proceed to hear the petition and fix just compensation (Public Utilities Act, § 1405). After the order is served (Public Utilities Act, §§ 1406-1407) with a notice of hearing, the hearing is held at the time and place specified in the order (Public Utilities Act, § 1409). When the proceeding is terminated, the Commission fixes, in written findings, the amount of just compensation to be paid by the political subdivision for the property as of the

day on which the petition was filed with the Commission (Public Utilities Act, § 1411). Within 20 days after the Commission has made and filed its findings, the owner of the property may file a stipulation consenting to accept the just compensation fixed by the Commission (Public Utilities Act, § 1412). If the owner does not so consent, the political subdivision commences an action in a court of competent jurisdiction to take such property under eminent domain proceedings (Public Utilities Act, § 1413). The court in which such action is commenced is bound, however, by the finding of the amount of compensation fixed by the Commission, and decides only whether "the political subdivision has the right and power under the law to take the lands, property and rights" (Public Utilities Act, § 1416).

The findings which the court must make in this connection are specified at length in § 1241 of the California Code of Civil Procedure. At no point is the court required to determine whether the money deposited for the property is free of claims. After the court has determined that the political subdivision has the *right* and *power* to condemn the property and has fixed the compensation at the amount set by the Commission, it enters an original (i.e. "interlocutory") judgment which states that "upon the payment of the just compensation fixed in the original judgment of condemnation the plaintiff in the action shall be entitled to immediate possession of the lands, property and rights" (Public Utilities Act, § 1419). When, in fact, payment is made either to the owner or

deposited with the court (Code of Civ. Proc., § 1252), the final judgment of condemnation is entered entitling the political subdivision to immediate possession.

Nothing in such proceedings requires or permits the Commission or the condemnation court to make a finding as to whether the money paid to defendants or deposited in the court is free from claims.

It follows that the contention of plaintiffs herein—that the sale of the City's bonds to First Boston was improper and that consequently the money obtained by such sale was tainted—can not be assumed to have been considered by the California Superior Court.

B. Assuming Arguendo, and Contrary to the Fact, That Findings Made by the California Superior Court in an Action to Which Plaintiffs Were Not Party Could Serve as a Bar to Plaintiffs' Otherwise Concededly Valid Claims Herein, Defendants Have Not Sustained Their Burden of Establishing That Such Findings Were, in Fact, Made by the California Court.

In its opinion dismissing the Complaint the lower court relied on findings which it *assumed* had been made by the California Superior Court. However, the foregoing discussion has quite clearly established that such findings had not *necessarily* been included in the state court's judgment of condemnation. If, in fact, the California Superior Court was even empowered to make such findings in a proceeding of the kind that was before it, then pertinent decisions show beyond any question that the burden of conclusively demonstrating to the District Court that such find-

ings had been made necessarily rested upon defendants.

The existence of this burden, as well as of the fact that defendants have failed to meet it, is well illustrated by the decision in *Johnston v. Ota,* 43 Cal. App. 2d 94 (1941), 110 P. 2d 507. In the *Johnston* case, the lower court had sustained a plea of *res judicata* in an action alleging breach of a lease agreement, relying for its decision on a copy of the judgment in an earlier case *in the same court, which had been attached as an exhibit to the answer.* The lower court purported to take judicial notice of the contents of the judgment roll without receiving any formal proof relating thereto. The appellate court reversed, stating (at pp. 97 and 98):

> "It must appear either upon the face of the record or be shown by extrinsic evidence that the *precise issue* raised in the second action was determined in the former suit. (Russell v. Place, 94 U.S. 606 [24 L. Ed. 214])." (Emphasis added.)
>
> "* * * The fact that the Judgment was attached as an exhibit to the answer, merely establishes its genuineness and due execution. (Code Civ. Proc., Sec. 448). It does not prove the matters adjudicated by the judgment of dismissal."

Similarly, in the case of *Garcia v. Venegas,* 106 C.A.2d 364, 235 P.2d 89 (1951), the California appellate court stated (at 106 C.A.2d p. 371):

> "The former judgment was rendered by a justice's court. The only evidence concerning that judgment and the action in which it was rendered is a document certified by the justice of the peace

as a transcript of the pleadings and proceedings as appeared from his docket. This document contains none of the pleadings. It indicates that appellant herein was the plaintiff and respondent herein the defendant, that a complaint for forcible detainer was filed and summons issued August 5, 1947; that the action came on for trial on October 1, 1947; and recites, 'it is ordered, adjudged and decreed that the Plaintiff do have and recover of and from the said defendant the sum of $55.00 debt and $5.50 costs, and that plaintiff have restitution of the premises.' It does not identify the premises, nor does it demonstrate that title to real property was or could have been involved or adjudicated in the former action. A justice's court may try title to real property when 'properly involved' in a forcible entry or forcible or unlawful detainer action as provided in subdivision 1(b) and 2(b) of section 112 of the Code of Civil Procedure. The issue of title is 'properly involved' in such an action in the narrowly limited situations described in *Cheney v. Trauzettel,* 9 Cal.2d 158 [69 P.2d 832], and *Higgins v. Coyne,* 75 Cal. App. 2d 69 [170 P.2d 25]. The meager recitals in the justice's court judgment which appellant invokes are insufficient to show that respondent's right, title, and interest in the property (even if it were the property mentioned in the complaint herein) was or could have been 'properly involved' and adjudicated in that action. The necessary elements of estoppel by judgment are lacking.''

See also to the same effect *Babcock v. Babcock,* 63 C.A.2d 94, 146 P.2d 279 (1944) (''The burden of prov-

ing that it [a factual issue allegedly determined in an earlier case] was tried and determined was, of course, upon the defendant"); *Emerson v. Yosemite Gold Mining Co.,* 149 Cal. 51, 57 (1906), 85 P. 122.

The foregoing cases very explicitly establish that a party asserting the existence of an estoppel through a prior judgment has the burden of proving that the precise issue in the case at bar actually was litigated and determined in the earlier suit. Nothing in this record indicates that defendants have, in any way, met such a burden.

C. In Point of Fact the Issues Raised by the Instant Complaint Were Not and Could Not Have Been Passed Upon by the California Superior Court.

After "just compensation" had been fixed in the state condemnation proceeding by the Public Utilities Commission at $2,206,000 (Par. 20), the Superior Court entered an Interlocutory Judgment which decreed that City had the right and power to take the lands in question. To the extent that such judgment is properly before this Court (and without conceding that it is) plaintiffs point out that said judgment was "interlocutory" in only one respect: as a precondition to the entry of final judgment, City was obligated to pay the amount of $2,206,000 to Citizens of California or deposit such amount in court. Thus, the Interlocutory Judgment provided in Paragraph VIII thereof:

> ". . . upon payment of the $2,206,000, subject to modification as provided in Paragraph VI above, to the defendant, or deposit of the moneys in

> Court for the defendant, the Court shall enter a final order of condemnation adjudging and decreeing that the said condemnation and taking shall be complete and final and that plaintiff (i.e. City) shall fully have, own and possess the lands, properties and rights sought in this proceeding comprising the municipal water system referred to in Paragraph IV hereof for the uses and purposes set forth in the Complaint herein."

The "modification" pursuant to the provision therefor in Paragraph VI, was as follows:

> "That the just compensation to be paid for the said lands, property, and rights is the sum of $2,206,000, which sum is subject to modification by reason of such increase or decrease as may hereafter be certified to this Court by the Public Utilities Commission of the State of California as provided by Sections 1416 to 1419, inclusive, of the Public Utilities Code."

Paragraph VII went on to make clear, in the following language, that such modification would not, in any event, stay the final judgment of condemnation:

> "That the filing of petitions to the said Public Utilities Commission for increase or decrease of the just compensation shall not act as a stay of this judgment in condemnation, but, as provided in section 1419 of the Public Utilities Code, upon the payment of the sum of $2,206,000, the plaintiff herein shall be entitled to immediate possession of the said lands, property, and rights."

Therefore, as of the date of entry of the Interlocutory Judgment, November 5, 1959, no determination

was made, or could possibly have been made, concerning the question of whether the money later deposited in the registry was "tainted." This is so because, as hereinabove stated, the money had not yet even been deposited and because all of the events, as a result of which it is alleged that the money became tainted, i.e., the misrepresentations by defendant City to First Boston Corporation and Associates, occurred in the months of March, April and May of 1962, two and one-half years after such date (Complaint, Pars. 26 *et seq.*). Specifically, it was only on March 19, 1962 that the City Council of defendant City adopted the resolutions providing for the issuance of the bonds, authorizing their sale and setting the date for receiving bids (Par. 26 of the Complaint; admitted in Par. 10 of the Answer). It was at this time that First Boston Corporation officially made known its interest in the purchase (Complaint, Par. 26, *et seq.*). And it was thereafter, up to and including May 17, 1962, that the alleged misrepresentations, misleading statements and failures to disclose occurred which gave rise to the disputed jural relationship which plaintiffs allege makes this action necessary.

It was not until May 17, 1962 that defendants deposited $2,206,000 in the Superior Court and, on the same day, the Superior Court entered the final order of condemnation which the court below held was collaterally attacked by this action. However, the undisputed facts show that prior to entry of this final order the California Superior Court never considered plaintiffs' contentions herein, nor could it have. The

order of condemnation of the Superior Court was entered on May 17, 1962, the very same day the $2,206,000 was deposited with the Superior Court, and such order was annexed *ex parte* (Par. 49 of Complaint; admitted in Par. 25 of Answer). The immediate entry of such order *ex parte*—that is, without notice to any adverse party and without a hearing—means that no party had the opportunity to bring the facts which are the basis of plaintiffs' contentions herein to the State Court's attention prior to entry of its final order. Nor do defendants contend that these issues were presented to the State Court thereafter.

The words of the final order simply state that "plaintiff has already paid into court for defendant the sum of Two Million Two Hundred Six Thousand Dollars ($2,206,000). . . ." The sole inference that can be drawn from these words, particularly in view of the procedural prerequisites and history hereinabove referred to, is that the Superior Court, when presented with the final order, viewed its function as solely to determine whether in fact $2,206,000 had been paid into the registry of the Court. When it did so determine, it entered the final order in accordance with Paragraph VIII of the Interlocutory Judgment quoted above as a mere ministerial act.

Thus the undisputed facts demonstrate that the contention that the sale of City's bonds to First Boston was improper was never presented to the Superior Court before its final order was entered. Nor has any contention been advanced herein that such an

argument was ever presented to the Superior Court thereafter. The only determination that the California court made was that $2,206,000 had, in fact been deposited, this being the sole determination it was bound to make under the terms of the Interlocutory Judgment.

On these facts the decided cases make it abundantly clear that the present action cannot be deemed a collateral attack on the state court judgment.

Allegheny County v. Mashuda Co., 360 U.S. 185 (1959) involved facts which were in many ways analogous to the instant situation. In that case, the United States Supreme Court forcefully overruled an argument to the effect that, because of alleged encroachment on a state's sovereign rights relating to eminent domain, a federal district court whose diversity jurisdiction had been properly invoked could refuse, pending the outcome of state court proceedings, to entertain a case seeking to bar the state condemnation action. The decision gave broad recognition (see particularly p. 190) to the power and duty of a federal district court to proceed with such a case notwithstanding that its effect would admittedly be to impinge on parallel, pending state court condemnation proceedings.

Other decisions similarly demonstrate that the attachment of *in rem* jurisdiction over property by the state courts will not bar the federal courts' exercise of a parallel, *in personam* jurisdiction even if the result would be an interference with the prior state court proceedings.

A recent example of such a case is *Banco Nacional de Cuba v. Sabbatino,* 193 F. Supp. 375 (S.D.N.Y. 1961), aff'd 307 F.2d 845 (2nd Cir. 1962). There, the agent for a Cuban bank sued a broker and a state court receiver in the United States District Court for conversion of certain monies. The receiver, appointed by the Supreme Court of the State of New York, had in his possession under court order, the proceeds of the sale for which plaintiff was suing. The order of the state court which had directed the turnover of the money in issue to the state court's receiver had provided that the proceeds were to be held "subject to the further order of the court and not to be withdrawn except on such order."

As in the instant case, the jurisdiction of the District Court was invoked on the basis of diversity as well as on the basis of the presence of a federal question. The Court of Appeals did not reach the question whether federal jurisdiction could have been grounded on the latter premise. It held that the diversity was established.

It was contended in *Banco Nacional* that the jurisdiction of the court was defective because the District Court lacked jurisdiction over the subject matter. The motion was based on the proposition that since the proceeds of the sale had been turned over to a New York state court and the state court had perfected its jurisdiction either *in rem* or *quasi in rem* over those proceeds before the District Court had perfected its jurisdiction over the parties, the District Court lacked jurisdiction over the subject matter. The Court of

Appeals conceded that it had been long established that the court which first obtained jurisdiction over a particular *res* is entitled to retain that jurisdiction to the exclusion of other courts. But the court concluded that the state court's possession of the fund in issue was no bar to the action. It held (at p. 852):

> "But if the action brought in the federal court is an *in personam* action that does not interfere with the state court's jurisdiction over the fund it holds, the federal court has jurisdiction to adjudicate the rights of the parties. *United States v. Bank of New York & Trust Co.,* 296 U.S. 463, 477, 56 S. Ct. 343, 80 L. Ed. 331 (1936); *Stanton v. Embrery,* 3 Otto 548, 93 U.S. 548, 23 L. Ed. 983 (1877). This is so even if the issues in the state court case and in the federal court case are identical.
>
> "For cases applying this rule where an in rem or quasi in rem action preceded an in personam one see *Markham v. Allen,* 326 U.S. 490, 66 S. Ct. 296, 99 L. Ed. 256 (1945) (state action followed by federal one); *United States v. Klein,* 303 U.S. 276, 58 S. Ct. 536, 82 L. Ed. 840 (1938) (federal action followed by state one); *Commonwealth Trust Co. v. Bradford,* 297 U.S. 613, 56 S. Ct. 600, 80 L. Ed. 920 (1936) (state action followed by federal one).
>
> "The plaintiff in the present case in an *in personam* action seeks a money judgment for damages against Farr, Whitlock for conversion. The fund in the hands of the New York state court need not be interfered with by a judgment for the plaintiff against Farr, Whitlock personally.

> Therefore, the state court's control of the sale proceeds has not preempted the jurisdiction of the federal court over the subject matter of the present litigation, and the court below was correct in holding that it had jurisdiction to decide the controversy between the parties."

Moreover, the principles set forth in the *Banco Nacional* case have been consistently applied in many other types of cases in which the federal courts have proceeded to give relief notwithstanding the existence of apparently conflicting state court proceedings. See, *e.g., Markham v. Allen,* 323 U.S. 490 (1946); *Commonwealth Trust Co. v. Bradford,* 297 U.S. 613 (1936); *Waterman v. Canal Louisiana Bank Co.,* 215 U.S. 33 (1909); *Byer v. McAuley,* 149 U.S. 608 (1893); *Clark v. Tibbets,* 167 F.2d 397 (2d Cir. 1948).

United States v. Klein, 303 U.S. 276 (1930)—a case involving a converse fact situation from that presented here—is nevertheless closely in point. There, a fund was in the registry of the federal court. A party claiming ownership of that fund sought to obtain an adjudication of his rights from the state court. On appeal to the Supreme Court, his right to such relief was upheld in the following language:

> "While a federal court which has taken possession of property in the exercise of the judicial power conferred upon it by the Constitution and laws of the United States is said to acquire exclusive jurisdiction, the jurisdiction is exclusive only insofar as restriction of power of other courts is necessary for the federal court's appro-

> priate control and disposition of the property. [Citations omitted.] Other courts having jurisdiction to adjudicate rights in the property do not, because the property is possessed by a federal court, lose power to render any judgment not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property. [Citations omitted.] *Similarly a federal court may make a like adjudication with respect to property in the possession of a state court.* [Citations omitted.]'' (Emphasis supplied.)

Thus, the Supreme Court held in the *Klein* case that notwithstanding the fact that the *res* or fund was in the custody of the federal court, the state court had *in personam* jurisdiction to declare ownership rights in respect of the fund. The only distinction from our case is that the fund here is in the registry of the state court, while it is the federal court that is being asked to declare, *in personam,* certain findings with reference to claims that may exist in respect of such fund.

It should also be noted that the reasoning of the *Klein* case completely undercuts the distinction purportedly made by the District Court herein (Tr. 53) of the *Mashuda* case on the supposed ground that *Mashuda* did not involve a final judgment.

Innumerable other decisions deal with and refute the possibility that an action such as the instant one, which is premised on issues not determined in a prior

judgment, can be viewed as a collateral attack on such an earlier judgment. See, *e.g.*:

Pete v. Henderson, 124 Cal.App.2d 487, 269 P.2d 78 (1st Dist. 1954);

Williams v. Nylund, 268 F.2d 91 (10th Cir. 1959);

Hixson v. Cook, 279 P.2d 677 (Okl. S.C. 1963);

Stavros v. Bradley, 313 Ky. 676 (Ky. Ct. App. 1950);

Arenas v. United States, 95 F. Supp. 962 (S.D. Cal. 1951) aff'd 197 F.2d 418 (9th Cir. 1952);

Rocky Mountain Fuel Co. v. Heflin, 148 Colo. 415 (Col. S.C. 1961);

Commercial Securities Co. v. Thompson, 239 S.W.2d 911 (Tex. Ct. Civ. App. 1951);

Kluth v. Andrus, 101 N.E.2d 310 (Ohio Ct. App. 1951).

In the *Rocky Mountain Fuel Co.* case, *supra,* it was contended that a state court action to quiet title constituted a collateral attack upon an earlier federal court order affecting the same property, which had been issued in connection with a reorganization proceeding. The court rejected this contention, stating (at p. 420):

> "The Fuel Company argues that the trial court's decree was a collateral attack upon the United States District Court's order. With this contention, we do not agree. The order of the United States District Court was one confirming and approving the sale of trust property, an acceptance of the consideration paid and an order

> implementing the completion of the transfer. *The United States Court had before it a question of liquidation of assets, payment of creditors and reorganization, not issues of the rule against perpetuities and the Colorado law of future interests.* See *Hildebrand v. Harrison* (Okla.) 288 P.2d 399. This action involves an interpretation of certain reservations in the Trustee's deed and does not involve an attack on a decree of the United States District Court. *St. Louis K. C. & C. Ry. Co. v. Wabash Ry.,* 217 U.S. 247, see *Koen v. Fort Bent Ditch Co.,* 67 Colo. 34, 184 Pac. 653; see also *Quintrall v. Goldsmith,* 134 Colo. 410, 306 P.2d 246." (Emphasis supplied.)

Similarly, in *Hixson v. Cook, supra,* a declaratory judgment was made adjudicating plaintiff's rights in property over the objection that some years earlier such property had been the subject of an apparently contrary judicial "homestead" judgment. The contention that the second proceeding amounted to a collateral attack on the earlier homestead determination was rejected by the appellate court which stated (at p. 684):

> "We agree that the order setting aside the homestead property has become final, but we do not agree that plaintiff's petition amounts to a collateral attack upon it, or that the county court order must be vacated before the district court acquires jurisdiction in this case. The county court order setting apart the order amounts to a determination merely that (1) the homestead character attached to the land at the time of the death of the decedent and (2) that at the time of

making the order, the surviving spouse had not waived or abandoned the homestead. The effect of such an order is (1) to forever free the homestead property of claims for debts of the decedent, and expenses and charges of administration, and (2) to postpone or delay the right of the heirs to take possession of the property until the homestead character has ceased to exist.

"A collateral attack upon a judgment is an attempt to avoid, defeat or evade it, or deny its force and effect in some incidental proceedings not authorized by law for the express purpose of attacking it. *Continental Gin Co. v. De Bord,* 34 Okl. 66, 123 P.2d 59.

"Plaintiff's petition in this case, and the district court judgment entered thereon, is not an attempt to 'avoid, defeat or evade' the county court order, or to 'deny its force and effect.' The property concerned is *still* free of debts of the decedent, and expenses and charges of administration; and the right of the heirs to take possession of the property *has* been delayed. The county court order has therefore been given full force and effect.

"The issue tried in the district court [in this case] was whether, subsequent to the entering of the county court order, Mrs. Hixson had by her conduct, abandoned the homestead. Needless to say, *this* issue was not presented to, or tried by the county court [in the previous case]." (Emphasis added.)

Likewise, in *Kluth v. Andrus, supra,* it was held that an action for mandamus would lie to vacate a civil service appointment notwithstanding that such

appointment had previously been approved in earlier judicial proceedings. Rejecting the argument that the mandamus suit constituted a collateral attack on the prior judgment, the court stated (at p. 322):

> "We do not consider that the present action constitutes a collateral attack on the judgment of the trial court in the Patton case, and, from the evidence before us, that case was undoubtedly correctly decided on the basis of the pleadings and facts there presented. It does not, however, adjudicate the rights of plaintiff in this case, whom we find entitled to the injunction prayed for."

See also *Arenas v. United States, supra,* where the District Court rejected a similar contention that an action constituted a collateral attack on a prior judgment in the following language (at p. 971):

> "No binding judgment can be rendered against a person involving his personal status or rights,—such as legitimacy or heirship,—unless he is a party to the action, or is before the court through representation by others. Della, as Guadaloupe's heir at law, was not before the court. She is a stranger to the record. Her rights of heirship were not asserted in any pleading filed in the case and were not adjudicated by the court. She cannot be deprived of them by a negative finding that Arenas is the 'sole heir,' when neither she nor the United States Government representing her *as an heir,* was before the court to assert or defend her heirship rights. The complaint in the Arenas case did not challenge her heirship by any direct allegation."

Plaintiffs here similarly seek only a declaration of their *in personam* rights. As indicated by the many decisions hereinabove discussed, such a declaration is proper notwithstanding the existence of an *in rem* judgment involving the property at issue, even if such judgment has conflicting implications.

POINT III

THE DISTRICT COURT IMPROPERLY CONSTRUED THIS COURT'S DECISION IN THIBODO v. UNITED STATES AS BARRING PLAINTIFFS' RIGHT TO RELIEF UNDER THE SECOND COUNT OF THE COMPLAINT.

As their second count of the instant complaint, plaintiffs alleged that their security interest had been impaired by an unlawful taking in violation of the provisions of the California and United States constitutions which inhibit the taking of private property without due process of law. The District Court peremptorily dismissed this count of the Complaint, stating (Tr. 50):

> "As to such an issue the Court of Appeals for the Ninth Circuit has noted, in an eminent domain situation, that relief should first be sought from the state courts (Thibodo v. United States, 187 F.2d 249, 257)."

On its face, however, *Thibodo* is wholly inapplicable to the instant case because here the federal court's jurisdiction rests on diversity of citizenship under 28 U.S.C.A. § 1332, whereas in *Thibodo* the

court's jurisdiction rested solely on an unconstitutional deprivation of rights which allegedly created federal question jurisdiction under 28 U.S.C.A. § 1346(2). *Thibodo v. United States, supra*, at p. 251.

Compare *Allegheny County v. Mashuda*, 360 U.S. 185, in which the federal court's jurisdiction rested on diversity of citizenship, as it does here. There the Supreme Court stated (at p. 196):

> "The propriety of a federal adjudication in this case follows *a fortiori* from the established principle that Federal District Courts should apply settled state law without abstaining from the exercise of jurisdiction even though this course would require decision of difficult federal constitutional questions. *Chicago v. Atchison, T. & S.F. R. Co.*, 357 U.S. 77; *Public Utilities Comm'n of California v. United States*, 355 U.S. 534; *Toomer v. Witsell*, 334 U.S. 385."

Naturally, the fact that plaintiffs also have a remedy in the state court does not mean that they are disentitled to an otherwise available remedy from the federal court. As the court stated in *C. D. Mathews Estate v. Olive Branch Drainage*, 185 F.2d 53 (7th Cir. 1950) (also a diversity case) (at p. 54):

> "Certainly the mere fact that the appropriate remedy in the state court, had plaintiff chosen to bring its action there, would have been by mandamus, a mode of relief not available in the United States court as an independent proceeding, does not mean that plaintiff has no standing in the federal court."

The court below also indicated parenthetically that (Tr. 52) "the abstention doctrine is additional support for compelling the plaintiffs to seek state court relief as to Count 2." There are, however, no grounds in this case for the invocation of that doctrine. See generally *Allegheny County v. Mashuda Co.*, 360 U.S. 185, 189. There is no disruption here of the state administrative process, no necessity of postponement because of the possibility that a determination of state law will moot the issues herein, no injunction of state officials from executing domestic policies and, in short, no hazard of disrupting federal-state relationships. The only questions for decision in connection with this second count are factual issues, many the same as those raised by the first count. The Supreme Court in *Allegheny County v. Mashuda*, *supra*, has stated that a federal court may not refuse to exercise jurisdiction "in the absence of exceptional circumstances which clearly justify an abstention." No such circumstances have been alluded to by the District Court in the instant case, and, in fact, none are here present.

The additional reasons adduced by the District Court for dismissal of the second count of the Complaint are insufficient justification for its dismissal. Consequently, the second count should also be allowed to stand.

CONCLUSION

The judgment below dismissing the complaint for failure to state a claim upon which relief can be granted should be reversed.

Dated, Sacramento, California,
December 2, 1963.

Respectfully submitted,
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Attorneys for Appellants.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

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